UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff	)	
	)	
v.	)	Cause No: 1:13-cr-00150 WTL-TAB
	)	
GUOQING CAO,	)	
SHUYU LI,	)	
a/k/a "Dan",	)	
	)	
Defendants	)	

MEMORANDUM IN SUPPORT OF
MOTION TO MODIFY CONDITIONS OF RELEASE

Defendant Guoqing Cao, by counsel and pursuant to 18 U.S.C. §3142, respectfully submits this memorandum in support of his motion seeking a modification of his bail conditions, allowing Mr. Cao to be released to home confinement with monitoring consistent with the Pretrial Services Report (Dkt. # 52) in place of his current confinement at the Volunteers of America ("VOA") facility in Indianapolis. Defendant Cao, confined at the VOA without the effective ability to assist his counsel in reviewing discovery and preparing for trial, is in an untenable circumstance which denies his Fifth Amendment right to a fair trial and his Sixth Amendment right to the effective assistance of counsel.

I. INTRODUCTION

Circumstances have changed substantially since this Court, on November 5, 2013, revoked the defendants' detention but remanded them to "lockdown" status at the VOA. The Government's trade-secret allegations have been abandoned and replaced with less severe charges of wire fraud. In addition, notwithstanding the Court's active and diligent efforts at case management, the pace of the case has slowed considerably, due to delays in the Government's production of discovery materials, extended reflections and pronouncements of a change in prosecutive theory through another superseding indictment, and, as well, by disputes between the Government and defense counsel in dealing with discovery and protective order issues in this highly technical case.

The resulting effect on the setting of milestone events is likely not what the Court anticipated when in November 2013 it set a May 2014 trial date and committed defendants Cao and Li to the lockdown custody of the VOA in the interim. The latest evidence that a true trial date lies well beyond the timeframe which the Court initially intended is the request by the Government, at a February 14, 2014 conference, that the Court abandon the May 2014 trial date in favor of what it called a more "realistic" trial date, which appears to be likely no sooner than the fall of 2014, even assuming the Court is available for trial at that time.

Five months after the defendants' initial October 2013 detention hearing, significant electronic discovery the Government concedes it must produce has not yet been produced; time-consuming privilege reviews are being conducted by Eli Lilly attorneys, delaying defense counsel's access to discovery material; and there are expected to be discovery disputes with the Government and with subpoenaed third parties brought to the Court for resolution. Because of the Government's pronouncement over a month ago that it would be seeking yet another superseding indictment, defense counsel has been left to speculate as to what charges might ultimately be left for trial and the process of engaging experts has necessarily been held in abeyance. In the meantime, the defendants languish at the VOA, and the prospect is that Messrs. Cao and Li will be in custody for what will readily amount to a year or more before this matter approaches trial.

But a period of custody in the VOA beyond the anticipated period is not the only punitive or injurious aspect of the defendants' confinement. The VOA is a halfway house, the vast majority of whose population is away during the day, and so its physical conditions were not designed for the needs of defendants awaiting trial, and requiring the ability to confer frequently with their counsel and to review and even store case-critical materials.

Compounding the limiting conditions of what the VOA can do to accommodate the needs of defendants confined prior to trial, the Government insisted here on terms in a protective order that have the practical effect of preventing counsel from showing their clients any of the discovery produced by the Government to date. Under the terms of the order, the restrictive designations assigned by the Government to virtually every single page of material (including Eli Lilly-published policies and guidelines available on the Web) mean that the materials must be kept in counsel's offices and may only be viewed by the defendants in their counsel's presence. Taken together, that means that the defendants must be in their counsels' offices in order to assist in their own defense, yet are not permitted to leave the VOA to do so.

Finally, we now know that the Government's original case brought under the Economic Espionage Act ("EEA") with allegations of trade-secret theft and arguments against pretrial release based upon allegations of the defendants' traitorous activity and treachery against the United States, was not as advertised. Those charges have faltered under the weight of substantial evidence showing that alleged "trade secrets" were actually publicly-known science. Last week, the Government filed its Second Superseding Indictment and officially jettisoned all EEA charges and banned any mention of the phrase "trade secret." The current charges have been reduced to one count of wire fraud against each defendant, together with a common charge of conspiracy to commit wire fraud. The number of charges and maximum years of imprisonment upon conviction are all drastically reduced. Where the Government once claimed in a detention hearing that it had strong evidence of traitorous activity in undermining American industrial might, it now parses Eli Lilly internal policies in striving desperately to find that either defendant has done anything wrong.

The Second Superseding Indictment resembles nothing so much as a civil complaint between two competing corporate interests, converted very tenuously to criminal charges. The iceberg of a case, trumpeted by the Government to the press and to the Magistrate Judge in order to obtain detention, has melted to an ice cube of uncertain solidity. Left out at room temperature much longer, it will soon be drops of moist nothingness, the faintest remainder of what once was.

II. PROCEDURAL HISTORY and STATEMENT OF FACTS

A. Detention imposed on October 2, 2013

Each defendant, secretly under indictment and with agents secretly holding warrants for their arrest, was interviewed by FBI agents serially in their respective homes on October 1, 2013. Both Cao and Li waived their rights to counsel and other *Miranda* rights, and each spoke freely with the agents, Li for two hours and Cao for more than three hours, sequentially, in their respective homes, and on the same morning without any opportunity to confer with one another. They answered every question, and independently maintained that neither had intended to take proprietary information from Eli Lilly, that neither did so, and that their exchanges of information were of public-domain science.

In the agents' pockets, but not disclosed to Messrs. Cao and Li, were arrest warrants. Following their consensual interviews, both were formally arrested. Having waived their immediate initial appearance, the defendants were not brought into court until the next day, October 2nd. The Government moved for their immediate temporary detention, which was granted, and a detention hearing was scheduled for October 8th. Magistrate Judge Dinsmore presided at the hearing. The hearing was accompanied by the Government's filing of a Motion for Pretrial Detention (Dkt. #34). The motion was heavily predicated on a superseding Indictment's allegations that each misappropriated Lilly "trade secrets." The motion sounded the most dire threats to the country, asserting that this case "involve[d] the intentional misappropriation of American industry" and "the transmission of American trade secrets." (*Id.*, at 2).

The prosecutor rhetorically went into overdrive at the hearing, accusing Messrs. Cao and Li of the traitorous betrayal of their adopted country: "I would say that this is a case about American might, American might that is driven by our country's ability to prosper, our country's ability to be innovative …If you look at 3142(g)(1) [of Title 18], the first factor … is the nature and circumstances of the crime. If the superseding indictment in this case could be wrapped up into one word, ***that word is 'traitor'***" (Transcript of detention hearing, Oct. 8, 2013, at 60:20-23; 61:2-7) (Dkt. #43) (emphasis added). Amplifying further on supposed evidence of traitorous activity, the prosecutor continued: " What you have before you are individuals who, what could be considered *traditional intelligence tradecraft,* carved out a niche and exploited that information that they were entrusted with, exploited the relationships that they garnered through their *hosting company, through Eli Lilly's – Eli Lilly and Company's trusting them.*" (*Id.*, 61:21-62:1) (emphasis added).

The Government repeatedly emphasized the foreignness of the defendants, even misstating the provable facts, to augment the portrait of foreigners bent on undermining America: "Well, we're talking about people who were entrusted by a company, *brought here to work by a company*,[1] and trusted by that company … who then *betrayed* that company." (*Id.,* at 63:21-25) (emphasis added). Continuing the theme of treachery against their adopted country, the prosecutor solemnly warned that "[the defendants] have, of course, friends here, but they have friends in the People's Republic of China, they have potential friends elsewhere. And all of these number of countries that they have resided – or that they have traveled to, the community ties are global." (*Id.*, at 65:7-11). By Order entered on October 11, 2013 (Dkt. #42), Magistrate Judge Dinsmore detained both defendants, explicitly and heavily reliant on the Government's depiction of its powerful, "trade secret" case..

B. This Court revokes detention, but remands defendants to VOA

Defendants Cao and Li then moved for review in this Court and to revoke their detention. By Order entered on November 8, 2013, and following a hearing on November 5, 2013, this Court granted the defendants' motions and revoked the detention Order previously entered. (Dkt. #87). In so doing, this Court looked first to

[1] Guoqing Cao came to the United States in the 1990s to attend graduate school at The Ohio State University, from which he achieved his PhD in 1995. From 1995 to 1999, he did his post-doctoral work at the University of Texas. He only began work at Eli Lilly in 1999. He was not in any sense "brought here [i.e., the United States] to work by [Lilly]."

what it called the "defendant-centric" factors of ties to family and community, financial resources, and extensive overseas travel, and held that these factors "somewhat" weighed in favor of detention, but that the "potential risk" did not necessarily warrant detention. (*Id.*, at 5). Turning to "non-Defendant-centric factors," the Court referred to evidence and argument from defense counsel at the hearing which "focused on the shortcomings of the Government's case." (*Ibid.*). "[T]he Court acknowledges that the Defendants raised several important questions as to the secrecy of the alleged trade secrets." (*Id.,* at 6). Leaving for another day the question of the weight of the evidence, the Court noted that "at this early stage of the proceedings, the Defendants have poked sufficient holes in the Government's case such that the weight of the evidence is not as strong as it appeared during the previous hearing before Magistrate Judge Dinsmore." (*Ibid.*).

As a result, defendants were released from jail custody and transferred to a halfway house, the VOA, to be held in "lockdown status pending trial." (*Id.,* at 6-7). There they remain.

C. VOA's physical conditions and Government-driven provisions in the protective order combine to make preparation in this highly technical case near-impossible

At the same time as the hearing and Order of this Court were taking place, the Government, anticipating beginning its production of discovery materials, sought a protective order closely controlling the review of, and access by the defendants and their counsel to, those materials. The provisions upon which the Government insisted – eventually embodied in the Interim Protective Order entered by the Court on February 4, 2014 (Dkt. #111) after many iterations exchanged among the attorneys – include the following: (a) materials designated by the Government as "restricted use" or "sensitive material" must remain locked in counsel's offices when not in use (¶¶ 16(b), 17(b); (b) defendants may only review such materials "in the presence of counsel and under the direct supervision and control of counsel" and any defendant's notes must remain locked in counsel's offices (¶¶ 16(d), 17 (d)).

The difficulties in working effectively with our clients was illustrated in the description provided by counsel for Mr. Cao at the February 14th conference:

> This case is huge. I've tried to cart some of the materials. I can't take them all with me over to the VOA, but there's no room. There's no -- I get a little office, it's a different office every time. The people at VOA are great, they are wonderful to deal with, but they are just limited in the facility. And I will get like a little office with a single desk, and I can't lay everything out. But it takes time to lay it out, put it back in a box, cart it back.
>
> There is one big multipurpose room that's available, but it has four doors that lead into it, and we get interrupted two or three times an hour; people coming in to do something, "No, no, sorry," back out. And the last time I was there, I actually had to leave early because they had a function scheduled that I didn't know about.
>
> It's impossible to prepare. This is a big science case, our clients are scientists. They need to educate their lawyers, and I can't do that at the VOA. I've actually had to bring a heater into a room at the VOA because it's cold in some of the rooms. It's just -- it's really hard.

(*Id.,* at 8:2-20) (comments of Mr. Hensel).

Aggravating these difficulties, the vast bulk of the discovery provided by the Government is in electronic form, not in paper copies, and much more electronically-stored information (ESI) is either expected to be produced or will be sought by the defense over Government resistance. Even if the protective order were radically altered to permit it, this is not a case where counsel can lug over to the VOA in his or her litigation bag a meaningfully representative portion of the case materials. Instead, counsel need to equip their respective client with a computer terminal or laptop and in side-by-side fashion fastidiously review many thousands of emails and other ESI.

D. More delays in getting to trial are presaged by the status of discovery

When at the February 14, 2014 status conference with the Court the Government advanced the idea of vacating the existing trial date, for May 2014, in favor of a more "realistic" trial date and extending the time for the Government to produce its discovery to the defense, the Government explicitly anticipated that it would still be making discovery in May 2014, the original trial date, and that the discovery process would even continue beyond that date. (*Id.*, at 13:19-23) ("[W]e could come back maybe on April 17th or May 19th, whichever date the Court could feel is more appropriate, and give a status [report].") (Dkt. #119) (4:1-20).

E. The Second Superseding Indictment marks a significant change in prosecutive theory

At the February 14, 2014 status conference, defense counsel asked the Government about the status of the oft-promised, and much-delayed, superseding Indictment. Defense counsel reminded the Court that, at the previous conference on January 16, 2014 (not transcribed), the Government had predicted that it would seek a second superseding indictment by the second week of February, which had not occurred. (*Id.*, at 5:8-17). Counsel advised that the Government had spoken of changing charging theories in any new indictment. (*Id.*, at 6:1-7).

Even the Court took note of the potential import of a change in theory, commenting that a change in prosecutive theory which reduced the severity of the charges might well precipitate a change in the Court's view as to bail conditions ("If the charges are reduced in any way, I may indeed take up an issue of release or detention again if brought. We'll just have to see how that shakes out.") (*Id.,* at 9:9-12).

F. In the limited fashion allowed to them by VOA confinement, defendants have demonstrated their trustworthiness, providing assurances of appearance

Despite their lockdown status, each defendant has been allowed out of the VOA facility for the limited purpose of receiving dental care. Mr. Li has been permitted to leave the VOA on multiple occasions to visit his dentist and to undergo oral surgery. In each instance, Mr. Li returned to the VOA in a timely manner without incident.

Likewise, on February 27, Mr. Cao left the VOA and was transported by his wife to his dentist's office in Indianapolis and returned to the VOA without incident, fifteen minutes prior to his scheduled return time. No representatives of the Marshal's Service or of the VOA played any role in the day's events; Mr. Cao simply and dutifully adhered to the conditions of his confinement.

Both defendants came to Court on January 16, 2014, on the occasion of a status conference. On that date, they were picked up by counsel from the VOA; then brought to the offices of PenceHensel, across the street from the Courthouse; met their respective counsel and spouses at that law office; and then walked across as a group to the Courthouse, unescorted by Marshals or any court personnel. When the conference concluded, they reversed the process, and were returned by counsel to the VOA in timely fashion.

Not that they would consider it for a moment, but this litany demonstrates that defendants Cao and Li have each had an opportunity, if they had chosen to avail themselves of it, to do what the Government predicted at the detention hearing in

October 2013 they would do: flee their adopted homeland for their country of birth. Neither did so, and each dutifully followed the directive to return to the VOA.

G. Mr. Cao's extended absence from home and family has caused significant collateral damage to one of his children

One of the children of Guoqing Cao and his wife, Megan Geng, has suffered Mr. Cao's absence acutely, leading to severe issues. In order to respect the child's privacy, the details are set forth in a sealed Exhibit A to this memorandum.

III. LEGAL ARGUMENT

Initially, it is clear that this Court is free at any time to re-examine and determine what bail conditions are appropriate to the status of this case. An order releasing a defendant on bail with conditions is subject to change at any time, without more, as Section 3142(c)(3) provides that "[t]he judicial officer may at any time may amend the order to impose additional or different conditions of release." [2]

Although this Court on November 8, 2013 did revoke the Magistrate Judge's detention order, it did not release the defendants, rather confining them to the custody of the VOA. The VOA, a halfway house, normally permits its already-sentenced federal

[2] It is clear that the more rigorous burden required for reconsideration under Section 3142(f) does not apply here. That section applies to an order detaining a defendant following a hearing, and provides that "[t]he hearing may be reopened, before or after a determination by the judicial officer, at any time before trial if the judicial officer finds that information exists that was not known to the movant at the time of the hearing and that has a material bearing on the issue whether there are conditions of release that will reasonably assure the appearance of such person as required and the safety of any other person and the community." However, an order conditioning bail on the defendant's confinement at the VOA ***is not*** a detention order subject to the heightened Section 3142(f) reconsideration standard. *United States v. Durham,* 2011 WL 1330850. *1 (S. D. Ind., April 7, 2011) ("a defendant released to a VOA community treatment center is not officially detained for purposes of the Bail Reform Act because that defendant is not subject to the complete control of the Bureau of Prisons") (citing *Reno v. Koray,* 515 U.S. 50 (1995)).

occupants to leave the facility at any time. *See United States v. Auberg,* 2001 WL 987802, *3 n.8 (S.D. Ind., July 9, 2001) ("the VOA is not a lock-down type facility. Residents of the VOA are able to leave at any time of their own volition"). However, Messrs. Cao and Li were committed to the custody of the VOA by this Court specifically with the proviso that they be held in lockdown condition.

But the delays in reaching trial in this case keep mounting, to the point where even the Government has conceded that the May 2014 trial date set by the Court is unrealistic. An enormous body of ESI remains to be produced, and defense counsel anticipate being obliged to subpoena needed materials from Eli Lilly, which will no doubt precipitate motion practice. Delays in an anticipated trial date provide a basis for reconsidering bail, even for granting release to defendants who were originally detained. *United States v. Gallo,* 653 F. Supp. 320 (E.D.N.Y. 1986). In *Gallo,* both defendants were detained on their arrest in 1986 on extortion and loansharking charges, when the District Court believed that the case "could be tried promptly." *Id.* at 325. Instead, due to the Government trying other defendants first, the original trial date was adjourned to 1987, which would leave the defendants incarcerated prior to trial for more than a year. *Ibid.* The length of detention had caused hardships for the defendants' families, including for defendant Vitta insomnia for his youngest son and a stress-related heart attack for the defendant himself. *Id.* at 326. The setting of a new, delayed trial date constitutes a significantly changed circumstance which warranted a rehearing of the detention issue. *Id*. at 327.

Then-Chief Judge Weinstein noted in *Gallo* that pretrial detention may not, under the Fifth Amendment, be punitively imposed, since it comes in advance of any adjudication of guilt; it is legitimate only as a regulatory measure under the Bail Reform Act. 653 F. Supp. at 334 (citations omitted). *Accord United States v. Warneke,* 199 F.3d 906, (7th Cir. 1999) (Section 3142 is remedial, not punitive, in purpose). However, the *Gallo* court noted, "[t]he inevitable consequences of pretrial incarceration, particularly when prolonged beyond a short period, are undeniably severe. They constitute a pattern of harms that we traditionally consider punitive, rather than merely regulatory." *Id.* at 336. The court observed that detention adversely affects the effectiveness of a defendant's counsel, explaining that "[t]he quality of the detainee's legal defense is likely to diminish dramatically as long as he or she is incarcerated. The interlude between arraignment and trial is 'perhaps the most critical period of the proceedings ... when consultation, thoroughgoing investigation and preparation .... [are] vitally important....'" *Id.* at 337 (quoting *Powell v. Alabama,* 287 U.S. 45, 57 (1932)).

> All of these hardships, including deterioration of morale, demeanor, finances, resources, reputation, and quality and thoroughness of legal defense, may combine to disadvantage the defendant at the judgment and sentencing stages of the proceedings. As to judgment, studies have indicated that detention is likely to increase the chances of conviction at trial … It is not the fact of detention, but the effects of detention on the defendant's demeanor and defense, that probably accounts for part of the correlation between detention before trial and conviction rates … There is, in addition, evidence that the *longer* the period of detention before disposition, the greater the likelihood of a prison sentence, because of the cumulative effects of detention on the defendant's demeanor and defense … Effectively, then, a long period of pretrial detention becomes punitive, even where that was not the intent of such detention … Detained defendants are stigmatized, disheartened, and made to suffer great hardships that would normally be associated with punitive sanctions. What is worse, they are then more likely, as a result of their detention, to be sanctioned in a more punitive manner if and when they are convicted.

Id. at 337-338 (releasing defendants on bail) (emphasis in original).

At some point, the length of pretrial confinement can run afoul of the Fifth Amendment's due process rights, and engender consideration of dismissal of the charges. But here the defendants argue only that the very real prospect of being locked up at the VOA, and away from their families and homes, for more than a year is significant enough to at least warrant release on bail. *See Warneke*, 199 F.3d at 908-09 (pretrial detention for 18 months' duration left the Seventh Circuit "deeply concerned about the length of time these defendants … have been in custody without a trial" even though the delay was largely attributable to their having filed a "mountain of motions"). Unlike *Warneke*, the trial delays here will largely have been attributable to the Government's shifting theories of prosecution, its inordinate initial delay in producing any discovery at all, and then its attenuated course of producing discovery thereafter.

Remembering always the Supreme Court's admonition that "[l]iberty is the norm, and detention prior to trial or without trial is the carefully limited exception," *United States v. Salerno,* 481 U.S. 739, 755 (1987), and that release under Section 3142(c)(B) requires imposition of the "least restrictive … combination of conditions [which] will reasonably assure the appearance of the person as required," we ask the Court to reconsider and to release Mr. Cao to home confinement with the conditions originally recommended by Pretrial Services in October 2013 (Dkt. # 52) when it assigned him the lowest possible flight risk score. Those conditions included: passport surrender; reporting to Pretrial Services as required; and home detention with GPS monitoring. Mr. Cao is also willing to post his Carmel home as added security.

IV. CONCLUSION

In sum, Defendant Cao seeks release to home confinement with conditions consistent with the Pretrial Services Report (Dkt. # 52), including GPS monitoring, pending the trial in this case. Continuation of the present conditions of confinement is unnecessary to meet the purposes of the Bail Reform Act and will, in the present circumstances of this case, serve only to disserve Mr. Cao's entitlement to an effective defense and a fair trial.

Dated: March 17, 2014

Respectfully submitted,

/s/ David J. Hensel

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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of March 2014, I electronically filed the forgoing with the clerk of the court by using the CM/ECF system. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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